

DALAM MAHKAMAH TINGGI MALAYA DI SHAH ALAM
DALAM NEGERI SELANGOR DARUL EHSAN, MALAYSIA

RAYUAN SIVIL NO: BA-12B-125-07/2017

ANTARA

DURIA MANUFACTURING SDN BHD
(NO. SYARIKAT: 1010427-T)

... PERAYU

DAN

STARKISS FOOD CORPORATION SDN BHD ... RESPONDEN
(NO. SYARIKAT: 395805-W)

(DALAM MAHKAMAH SESYEN DI SHAH ALAM
DALAM NEGERI SELANGOR DARUL EHSAN, MALAYSIA

SAMAN SIVIL. B52-139-09/2015

ANTARA

STARKISS FOOD CORPORATION SDN BHD
(NO. SYARIKAT: 395805-W)

... PLANTIF

DAN

DURIA MANUFACTURING SDN BHD
(NO. SYARIKAT: 1010427-T) ... DEFENDAN)

GROUND OF JUDGMENT

Introduction

[1] This is an appeal by the Appellant (the Defendant) against the decision of the Sessions Court which allowed Respondent's (the Plaintiff) claim of RM800,240.00 on 7.7.2017.

[2] In this judgment, the parties will be referred to as they were in the Sessions Court. Having read the records of appeal and the written submission of both counsels and having heard the oral submission on 7 August 2018, I dismiss the appeal with costs with preliminary grounds. My full written ground follows.

Brief Facts

[3] The background facts leading to this appeal can be summarised as follows:

- (a) The Plaintiff is a company incorporated under the Company Act 1965 and having its address at Lot 33, Jalan Sri Ehsan 1, Taman Sri Ehsan, 52100 Kepong, Kuala Lumpur and registered address at No. 568-8-44, Komplek Mutiara 3 ½, Jalan Ipoh, 51200 Kuala Lumpur.
- (b) The Defendant is a company incorporated under the Company Act 1965 and a business partner with the Plaintiff, having its address at L5-07, Level 5, Wisma BU 8, No. 11, Lebuh Bandar Utama, Bandar Utama, Petaling Jaya, 47800

Selangor Darul Ehsan and/ or at No. 5933 Jalan Perusahaan Kamunting, Kawasan Industri Kamunting, 34600 Perak Darul Ridzuan and/or Lot 39A & 39M, Kompleks Selayang, Batu 8-1/2, Jalan Ipoh, Batu Caves, 68100 Selangor Darul Ehsan.

- (c) The Plaintiff is in a business of durian processing and the Defendant would supply durian to the Plaintiff based on a number of invoices with TT Remittance (paragraph 3 of Statement of Claim, page 13 of Record of Appeal). The Plaintiff claimed that the Plaintiff ordered durian goods from the Defendant and deposited the amount of RM500,000.00 through TT Remittances to the Defendant (Exhibit P1, pages 149 – 153 of Record of Appeal) for the ordered durian goods. The Plaintiff claims that the Defendant failed to supply the durian goods to the Plaintiff.
- (d) The Plaintiff also claimed that the Defendant failed to pay for the mooncakes that the Defendant ordered from the Plaintiff amounting to RM300,240.00 (Exhibit P2, pages 154 – 158 of Record of Appeal).
- (e) The Plaintiff then proceeded to file a Writ of Summons and Statement of Claim dated 15.9.2017 (pages 8-14 of Record of Appeal) against the Defendant.
- (f) The Defendant on the other hand denied knowing the advanced deposit for the durian goods and denied ordering the mooncakes from the Plaintiff. The Defendant denied failure of delivery and claimed that the durian goods were

delivered through its driver to the Plaintiff's representative which had been received by the Plaintiff and/or its representative, at the Plaintiff's factory, in the presence of the Plaintiff's employee and a mooncake consultant hired by the Plaintiff.

- (g) The Defendant also denied that the Defendant purchased and/or ordered any mooncakes from the Plaintiff.

Defendant's submission

[5] The counsel averred that the Session Judge erred by finding the Defendant's Defence improper where the Defendant had pleaded that if the payment by the Plaintiff was true, it was for some other billing. The counsel averred that the Plaintiff's claim on a purported sealed agreement was not produced at the Sessions Court. The counsel further submitted that the incomplete documents were still relied by the Plaintiff and that the Plaintiff had testified accepting the goods sold and delivered to the Plaintiff with incomplete documents are acceptable on a goodwill basis. The Defendant's counsel averred that the Plaintiff actually received the incomplete documents for the purchase and delivery of the durian goods where the Plaintiff's representatives had received although the documents did not meet the procedural standard, as testified by the Defendant's witnesses, SD1, SD2 (driver), SD3 (Defendant's Production Supervisor) and SD4 (driver).

[6] It is submitted that the Session Judge erred in placing the burden of proof on the Defendant instead on the Plaintiff following **section 102 of the Evidence Act 1950, the case of Badan Pengurusan Bersama**

Plaza DNP v Ong Kow Meng [2012] 1 LNS 1198; the case of Letchumanan Chettiar Alagappan (As Executor To SL Alameloo Achi (Deceased) & Anor v Secure Plantation Sdn Bhd [2017] 5 CLJ. The counsel averred that the Plaintiff's witnesses admitted not having the personal knowledge of the purchase and delivery of the durian goods between the Plaintiff and the Defendant and that there was no proof on the Plaintiff's part to show that the Plaintiff did not receive the durian goods delivered by the Defendant.

[7] The Defendant's counsel also submitted relying on the Federal Court case of **RHB Bank Bhd (Substituting Kwong Yik Bank Berhad) v Kwan Chew Holdings Sdn Bhd [2010] 2 MLJ 188** and the case of **Samuel Naik Siang Ting v Public Bank Bhd [2015] 6 MLJ 1**, that there was a deviation of the Plaintiff's pleading where the Plaintiff's witness statement stated that there was agreement on the shipment of product where the Defendant made payment for shipment product mooncake but the Plaintiff failed to show the agreement in any form to the Sessions Court. It is submitted that parties to a dispute are bound by their pleadings.

Plaintiff's submission

[8] Briefly, the learned counsel for the Plaintiff submitted that the Session Judge had evaluated and analysed all issues raised by the Defendant in relation to the claim for the advance payment made and on the other, the supply of mooncakes by the Plaintiff to the Defendant. The Plaintiff's counsel submitted that the RM500,000.00 was an advance payment as deposit proven by the TT Remittance submitted (pages 149

– 153 of Record of Appeal) and averred that there was no challenge by the Defendant.

[9] It is submitted that the Defendant, as found by the Session Judge, failed to plead, in reference to the invoices (P 4 – P11) which are not relevant to the Plaintiff's claim as the invoices P4- P5 and P7 – P11 are invoices of SK Unifoods where plaintiff helped to manage the Defendant's delivery to SK Unifoods in Singapore. It is submitted that the Session Judge had stated in its judgment (paragraph 4, page 7 of Supplementary Record of Appeal) that the Defendant failed to challenge or proof otherwise.

[10] On the sealed agreement argument, the counsel submitted that at the trial, both parties had agreed that this is a case of sale of goods. It is submitted that the Session Judge had addressed on the shipment of product at pages 22 and 23 of her written judgment where the Session Judge had heard the discrepancies of the witnesses' statements on the terms of shipment of product and sale of the mooncakes and the Session Judge finds highly doubtful that the goods were delivered to the Plaintiff. The counsel relied on **section 38 of the Contracts Act 1950** and the Court of Appeal case of **Heller Factoring Sdn Bhd (Previously known as Matang Factoring Sdn Bhd) v Metalco Industries (M) Sdn Bhd [1995] 2 MLJ 153** and submitted that there was part performance of contract by the Plaintiff with the Defendant.

Decision of the Sessions Court

[11] Briefly, the Session Judge's Ground of Judgment, at pages 1- 26 of the First Supplementary Record of Appeal, among others found that

the Defendant did not object to the claim of the Plaintiff for the deposit paid for the durian goods and that there were discrepancies in the Defendant's witnesses' evidence as to the acceptance of the deposit, the delivery of the durian goods and the sale of mooncakes to the Defendant.

APPEAL

[12] Having read both the written submission and heard the oral submission by both counsels, I dismiss the appeal with costs. The counsel for the Defendant advanced five grounds of appeal. Briefly, the grounds are narrowed into three main issues that is the burden of proof, the agreement between the parties based on a goodwill business practice and the witnesses' evidence.

[13] This Court viewed that the heart of the matter is the advancement of deposit made by the Plaintiff for the durian goods which were claimed by Plaintiff not delivered and the sale of the mooncakes to the Defendant that were not paid. The Defendant contended that the Defendant never failed to deliver the durian goods to the Plaintiff and the Defendant never ordered for the mooncakes from the Plaintiff.

[14] This suit was brought by the Plaintiff for the claim of advance deposit and the payment for the sale of mooncakes, both made to the Defendant. It is trite law that the burden to proof rests with the party who asserts, in this case, the Plaintiff, following **section 101 of the Evidence Act 1950** and the burden of proof principle as enunciated by the Federal Court in the case of **Letchumanan Chettiar Alagappan [2017]** (*supra*) as submitted by the Defendant's counsel. Once the Plaintiff has

discharged its burden to proof, the onus then shifts to the Defendant to rebut.

[15] Reverting to the facts, the Plaintiff is claiming for the total sum of RM800,240.00 as of 31.8.2014 which consist the deposit and the sale of mooncakes amounting to RM300,240.00. Upon careful perusal of the facts and evidence before this Court, as documented in the Record of Appeal, the documents of TT Remittances (pages 149 – 153 of Record of Appeal) had been adduced by the Plaintiff where the Defendant did not deny receiving the advanced deposit via the TT Remittance (dated 20.6.2014, 27.6.2014, 7.7.2014, 8.7.2014 and 17.7.2014).

[16] This Court finds that the Defendant merely denied that the TT Remittance was deposit for the ordered durians. Instead of objecting the advanced deposit as payment for the durian goods, the Defendant claimed that the deposit advanced by the Plaintiff was payment for other transactions with Plaintiff. The Plaintiff's witness, SP1 testified that the deposits via TT Remittance were requested by the Defendant for the ordered durian goods (page 35 of Record of Appeal). No evidence was adduced to prove the other transactions as claimed by the Defendant nor to rebut that the TT Remittances are deposits for the ordered durian goods (page 38 of Record of Appeal).

[17] This fact finding was correctly pointed out by the Session Judge in her written judgment where the learned Session Judge rejected the evidence of the Defendant and viewed that such claim as set off or counterclaim by the Defendant was not pleaded by the Defendant (paragraph 4, page 7 of Supplementary Record of Appeal).

[18] The invoice for the 36,000 mooncakes was issued by the Plaintiff to the Defendant dated 31.8.2014 (page 154 of Record of Appeal) was received by the representative of the Defendant and there were also temporary delivery notes for the durian mooncakes (pages 155 – 157 of Record of Appeal) an accepted practice of the Defendant (page 36 of Record of Appeal). The document produced by the Defendant was found however for other mooncakes (page 42 of Record of Appeal). Based on the testimonies of the Defendant's witness, SD6 whom claimed that the mooncakes are set off for the delivery of the durian goods, this Court finds again that such set off claim was never pleaded by the Defendant (page 108 of Record of Appeal, paragraph 4.4 of Defence, page 14(c) of Record of Appeal).

[19] The Plaintiff through its witness SP1 confirmed that the deposit had been made and acknowledged receipt by the Defendant. The onus now shifts to the Defendant to prove that the durian goods were indeed delivered and received by the Plaintiff. The Defendant contended that the durian goods were delivered based on Delivery Orders (pages 159 – 196 of Record of Appeal). Upon careful perusal, there were no company stamp and signatures of the Plaintiff to prove that there was acceptance for the ordered durian goods. The Defendant's witness SD2 also testified that there were no company stamp nor company's address in the documents claimed to show receipt by the Plaintiff (pages 70-71 of Record of Appeal).

[20] Based on the testimonies of the Defendant, the Defendant could not verify whether the person receiving the durian goods is the Plaintiff's representative as it was testified by the Defendant's witness, SD1 that the durian goods were delivered late at night where the Plaintiff's factory

was closed and the Plaintiff's staff was not at the factory except for the foreign worker (pages 62 – 63 of Record of Appeal). SP1 had testified that there must be authorised person to receive the delivery with the invoice or Delivery Order (page 37 of Record of Appeal), consistent with the testimony of SP2, the accountant for the Plaintiff (pages 51 – 52 of Record of Appeal). This Court also finds that the Defendant's witness, SD3 who is the Production Supervisor could not certify that the delivery of the durian goods were received by the Plaintiff (pages 75 – 77 of Record of Appeal). It is also found that the acceptance of delivery receipt copy produced at the Sessions Court by the Defendant's counsel was not the original copy but was a carbon copy (page 63 of Record of Appeal).

[21] I must therefore reject the fact and evidence that a delivery late at night where the Plaintiff's factory had closed and the acceptance of durian goods delivered to a foreign worker who is not authorized to accept on behalf of the Plaintiff, is a goodwill business practice. This fact finding that a stranger had accepted the delivery of the Defendant when the Plaintiff's factory was closed was also rejected by the Session Judge (pages 10 – 17 of First Supplementary Record of Appeal).

[22] This Court viewed that the onus to prove that the durian goods were delivered and accepted by the Plaintiff shifts to the Defendant to rebut and had not been discharged by the Defendant. The evidence of the Defendant further strengthened the Plaintiff's claim that there was no prove that the durian goods were delivered to the Plaintiff and accepted by the Plaintiff. This Court viewed that the advancement as deposit by the Plaintiff is part performance of the Plaintiff following **section 38 of the Contracts Act 1950** and the Court of Appeal case as attributed by

the Plaintiff's counsel, **Heller Factoring Sdn Bhd** (*supra*). Therefore it is of the view that the advanced deposit should be returned to the Plaintiff as the durian goods were proven not delivered to the Plaintiff.

[23] This Court finds that the Session Judge had evaluated all the facts and evidence and considered the witnesses' testimonies, tested against the documentary evidence before the Sessions Court. This Court viewed that the Session Judge was not wrong in law in allowing the Plaintiff's claim to warrant this Court's intervention: **Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1.**

In light of the above reasons, the appeal is dismissed with costs.

Dated: 8 March 2019


(ZALITA BINTI ZAIDAN)
Judicial Commissioner
Shah Alam High Court

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